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No. 80-705

In the Supreme Court of the United States

October Term, 1980

RODELL GRANT, et al.,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS CORPORATION

and

TEAMSTERS LOCAL NO. 541

and

INSULATION PRODUCTION WORKERS
LOCAL UNION NO. 1,
Respondents.

BRIEF OF RESPONDENT TEAMSTERS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioners have failed in their petition to demonstrate that there are any special and important reasons, as required by Rule 19 of the Rules of the Supreme Court and more particularly by Rule 19(1)(b), to grant a review of the decision of the Tenth Circuit Court of Appeals affirming the granting of respondent Teamsters' Motion for Summary Judgment.

I

Question for Review No. I Relates Only to Alleged Error of the Court of Appeals in Respect to Production Workers.

In Question I Presented for Review and in Point I of the Reasons for Granting the Writ, petitioners claim that the decision of the Court of Appeals directly conflicts with previously enunciated principles of this Court's ruling, to-wit: That the duty of fair representation is owed to all individual members of the statutory bargaining unit. Petitioners argue that the District Court and Court of Appeals found the respondent Production Workers ("Workers") owed no duty to petitioners. Petitioners make no such claim in Point I or elsewhere in their Petition as to Teamsters; therefore, petitioners having made no allegation of conflict with decisions regarding Teamsters, respondent Teamsters will not address such claim.

II

Had Teamsters Discovered the Existence of the "Side Agreement" Same Could Not Be the Basis of a Decision to Arbitrate Because It Was Not Part of the Applicable and Controlling Collective Bargaining Agreement. Such Issue Cannot Be Raised for the First Time on Appeal.

In Question II Presented for Review and in Point II thereunder, petitioners contend that the decision of the Tenth Circuit directly conflicts with the principles enunciated by this Court in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048, 47 L.Ed. 2d 231 (1976).

The holding of this court in *Hines* was that it is improper to dismiss an employee's suit against his employer if the employee proves an erroneous discharge and the

union's breach of duty of fair representation taints the arbitrator's decision. The holding in *Hines* does not conflict with the holding of the Court of Appeals in the instant case; nor does the court's discussion and elaboration of the *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, standards of a union's duty of fair representation conflict with the decision of the Court of Appeals here.

Petitioners contend that Teamsters should have, in some manner, discovered the existence of an alleged amendment to the *preceding* Collective Bargaining Agreement entered into by Workers and Owens (Petition p. 8). Assuming, *arguendo*, that Teamsters had a duty to discover the amendment (reproduced as Appendix D, p. A-26 in Petition) petitioners fail to explain how an amendment to the "*preceding* Collective Bargaining Agreement" would control the "bumping" rights of petitioners under the 1972-1975 collective bargaining agreement which specifically prohibited such "bumping back" during the term of that contract.

The layoff in question occurred in November, 1974, during the 1972-1975 contract term. Therefore, the 1972-1975 contract obviously applied as the Court of Appeals stated in its Opinion (Petition p. A-11):

> This is particularly true when, as here, appellants could not "bump" back into the Production Department under the terms of the 1972-1975 collective bargaining agreement.

The Court of Appeals and the District Court held, *inter alia*, that the controlling and relevant collective bargaining agreement was the 1972-1975 agreement. The amendment or "side agreement" referred to in the Court of Appeals' opinion (Petition p. A-4-5; A-19) provided only that the Production Department employees who trans-

ferred to other departments between April 16, 1969 and April 16, 1972 could maintain their seniority if they met other conditions set forth in the agreement.

It should be noted that the provision not allowing these petitioners and others in their classification in the Maintenance Department to "bump" back into the Production Department was a part of every agreement from 1957 to 1975.

Therefore, although this court in *Hines* affirmed the *Vaca v. Sipes* proposition "that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner", 386 U.S. at 191, 87 S. Ct. at 907, there is no conflict between *Hines* and the Court of Appeals' decision here which in effect held that the controlling agreement was the 1972-1975 contract and, therefore, the "side agreement" amending the 1969-1972 contract was not applicable or controlling.

Teamsters did not breach its duty of fair representation by failing to discover an amendment to a preceding collective bargaining agreement which is not part of the controlling or applicable contract; nor did Teamsters breach its duty by failing to base a decision to arbitrate on such an inapplicable provision.

Petitioners cite *Milstead v. Teamsters Local 957*, 585 F. 2d 232, 99 LRRM 2150 (6th Cir. 1978) in support of their contention. However, *Milstead* involved a provision which may have been inadvertently omitted from the existing or controlling collective bargaining agreement. Here, the applicable existing and controlling collective bargaining agreement (1972-1975) contained a clause specifically prohibiting "bumping back" by those employees in petitioners' classification.

Petitioners raised the issue of Teamsters' failure to discover the existence of a written amendment to the preceding collective bargaining agreement for the first time before the Court of Appeals. No such allegation or claim was made in the pleadings, briefs or oral arguments in the District Court. As stated in the findings in the District Court's Journal Entry at Petition A-20:

> That plaintiffs' only complaint as to defendant Teamsters Local #541 was that said union disagreed with plaintiffs' interpretation of a contract.

Petitioners failed to raise such issue in the District Court despite the fact that they had knowledge of the "side agreement" (that they now claim governs the present issues) some nine months before oral argument in the District Court. Petitioners' Motion for Partial Summary Judgment (Appendix A hereinafter) and its Suggestions in support thereof and in opposition to Respondents' Motion for Summary Judgment raised only issues under the 1972-1975 agreement.

A theory of recovery asserted or presented for the first time on appeal cannot be considered by the appellate court. *State Farm Mutual v. Midcontinent Gas Co.*, 518 F. 2d 292 (10th Cir. 1975); *Hunt v. Pan American Energy, Inc.*, 540 F. 2d 894 (8th Cir. 1976); *Capps v. Humble Oil and Refining Co.*, 536 F. 2d 80 (5th Cir. 1976).

III

There Is No Ambiguity in the Controlling Collective Bargaining Agreement and There Is No Evidence of Past Practice. Past Practice Would Be Superseded, in Any Event, by Specific Provisions of the 1972-1975 Collective Bargaining Agreement.

Petitioners in Question III and in Point III thereunder contend that the Court of Appeals erred in affirming the

District Court's Judgment granting Teamsters' Motion for Summary Judgment when there are unresolved questions of material fact. Petitioners claim that where there is an ambiguity of the collective bargaining agreement and where past practices have allowed the right claimed by petitioners there is a conflict and a question of material fact that must be resolved at trial.

The Court of Appeals in its Opinion reviewed the general standards governing the entry of summary judgment and stated (Petition p. A-10):

> Applying these standards, we hold the trial court did not err in granting appellees' summary judgment.

In claiming that there is an "ambiguity in the contract" petitioners again refuse to accept the fact that the 1972-1975 contract applied to the layoff which occurred in November, 1974, and that the 1972-1975 contract specifically stated that employees in the petitioners' classification had no "bump back" rights to the Production Department. There is no ambiguity in that provision which is specifically set forth at Petition p. A-4 with emphasis supplied to that clause. Therefore, no ambiguity exists in the controlling or applicable collective bargaining agreement.

As to "past practices" petitioners fail to point to any evidence whatsoever disclosing that any employee in the classification of petitioners had "bumped back" to the Production Department except the "side agreement" set forth in Appendix D of the petition. On the contrary, Petitioner Barnes Parker testified in his deposition that there had been no layoffs in the Maintenance Department between 1969 and the 1974 layoff (Parker Deposition p. 29). As stated by the Court of Appeals, the "side agreement" covered transfers between April 16, 1969 and April 16, 1972 - that is, the contract term immediately preceding the period applicable to the layoff involved here.

It also should be observed that even assuming the record contains evidence of same, past practice cannot supersede specific provisions of a written agreement to the contrary. These specific provisions are contained in the 1972-1975 agreement (Petition p. A-4).

Further, petitioners conceded that the 1972-1975 collective bargaining agreement controlled petitioners' right to displace or "bump" Production Department employees so as to avoid the layoff of November 25, 1974 (Request for Admission No. 23; Deposition Barnes Parker, pages 69-70, lines 5-25 and lines 1-21).

There being no material question of fact that the 1972-1975 collective bargaining agreement controls the issue and that the 1972-1975 contract specifically prohibits "bumping back" by employees in petitioners' classification there was no material issue of fact for trial and the Court of Appeals did not err in affirming the District Court's entry of summary judgment.

IV

Petitioners Make No Claim, nor Is There Any Evidence, That Teamsters Acted in Bad Faith or Arbitrarily in Negotiating the 1972-1975 Contract, Particularly Since Teamsters Had No Knowledge of the "Side Agreement" During Those Negotiations. The Issue of Failing to Negotiate the "Side Agreement" Into the 1972-1975 Contract Was Not Raised in the District Court and May Not Properly Be Raised on Appeal.

Petitioners contend in Question IV and Point IV that the Court of Appeals erred in not allowing petitioners to amend their pleadings to allege that Teamsters and Workers breached their duty of fair representation in failing to negotiate the 1972-1975 collective bargaining agree-

ment to include seniority rights allegedly given petitioners in the 1971 amendment.

Teamsters could not have negotiated the 1971 "side agreement" into the 1972-1975 collective bargaining agreement for the simple reason that Teamsters did not become aware of that agreement between Workers and the employer Owens-Corning until the document was first produced during discovery proceedings on December 9, 1977.

Petitioners do not claim in their petition or supporting brief that Teamsters' failure to negotiate a provision about which the Teamsters had no knowledge until five years after the 1972-1975 contract was entered into was arbitrary or as a result of bad faith on the part of Teamsters. Simply negotiating or failing to negotiate a particular provision in or out of a collective bargaining agreement, particularly whefe such provision may adversely affect different classes of employees, cannot in itself constitute an arbitrary breach of the union duty of fair representation.

A union is not obligated to secure enforcement of seniority rights in derogation of a controlling collective bargaining agreement. *Patterson v. Tulsa Local No. 613*, 446 F. 2d 205 (10th Cir. 1971), cert. denied, 405 U.S. 976 (1972); nor does a union act arbitrarily in negotiating terms of a collective bargaining agreement that may override interests of a few in favor of the entire unit, *Battle v. Clark Equipment Company*, 579 F. 2d 1338 (7th Cir. 1978). Petitioners make no claim and there is no evidence that Teamsters negotiated in an arbitrary manner.

The issue of failure to negotiate the "side agreement" into the 1972-1975 collective bargaining agreement was not raised by petitioners in the District Court proceedings although petitioners had knowledge of the "side agreement" for nine months prior to argument of the Motions for Summary Judgment.

The letter of July 29, 1971, which allegedly changed the seniority provisions for the 1969-1972 period, was discovered by petitioners and Teamsters through discovery on December 9, 1977. Two months later, on February 15, 1978, petitioners were served with Requests for Admissions which included Request No. 23 as follows:

> Plaintiffs' right to displace or bump Production Department employees so as to avoid the furlough of November 25, 1974 were controlled by the terms of the 1972-1975 collective bargaining agreement.

Petitioners did not file a response to said Requests for Admissions and to this date have not responded or denied same. As the District Court observed in its Memorandum Order (Petition p. A-13), the facts contained in those Requests for Admission are therefore, deemed to be conclusively true under Rule 36, F.R.C.P.

Thereafter, on June 27, 1978, petitioners filed their Motion for Partial Summary Judgment, a copy of which is attached hereto and incorporated herein (App. A, p. 15).

The sole issue raised by petitioners in their Motion for Summary Judgment was:

> That under the 1972-1975 collective bargaining agreement, plaintiffs had the right to exercise their accumulated seniority to transfer back from the Maintenance Department to the Production Department under the provisions of said Collective Bargaining Agreement as specified more fully herein.

Nowhere in their Motion or Suggestions in Support Thereof or in Opposition to Defendants' Motions for Summary Judgment did petitioners raise an issue of breach of the Teamsters duty by reason of failure to negotiate the "side agreement" into the 1972-1975 collective bargain-

ing agreement; nor did petitioners raise such issue in oral argument before the District Court on September 7, 1978.

Although petitioners had knowledge for nine months of the so-called "side agreement" on which they now base their argument that they should at this late date be allowed to amend their pleadings, no such issue was raised in the District Court.

As stated above, a theory of recovery asserted or presented for the first time on appeal cannot be considered by an appellate court. *State Farm Mutual v. Mid-Continent Gas Co.*, supra; *Hunt v. Pan American Energy, Inc.*, supra; *Capps v. Humble Oil & Refining Co.*, supra.

The issue raised in Point IV was not submitted to the District Court and petitioners should not be permitted to raise it on appeal.

V

The Decision of the Court of Appeals Affirming the District Court's Order Granting Teamsters' Motion for Summary Judgment Is Correct and Is in Accordance With Settled Principles.

The Court of Appeals carefully analyzed and reviewed the evidence presented by the parties following completion of discovery. The evidence considered included the deposition of one of petitioners, Barnes Parker, who represented all of the petitioners in the grievance matter, the depositions of Willie Sewell, Teamsters' business agent, Harry Hutton, Workers' business agent and William K. Browne, Personnel Director of Owens-Corning. Also before the Court were Interrogatories, Requests for Admissions and the Complaint and Answer. This substantial volume of evidence showed no genuine issue as to any material fact.

The uncontradicted evidence showed that the controlling or applicable collective bargaining agreement was the one in effect at the time of the layoff on November 25, 1974, to-wit the 1972-1975 agreement. The provisions of that agreement in effect disallowed employees in petitioners' classification from "bumping back" to the Production Department from the Maintenance Department in layoff situations.

The Teamsters processed petitioners' grievance in a timely manner through the various steps of the grievance procedure set up by the contract and the Teamsters continually aided petitioners in the preparation and presentation of their grievance up to and including the final step of the procedure short of arbitration. At that point Teamsters refused to process the grievance to arbitration because it found nothing in the contract to support the grievance and in fact, provisions of the controlling contract which had been part of the collective bargaining agreement since 1957 specifically disallowed the rights petitioners claimed. Teamsters believed that it could not prevail in arbitration and so advised petitioners.

Barnes Parker, one of petitioners who filed the grievance and who represented all petitioners, testified in his deposition that he had no complaints relative to the manner in which Teamsters had treated him or the other petitioners.

The Court of Appeals correctly enunciated the settled principles applicable to this unfair representation case against Teamsters, i.e. Teamsters did not breach its duty of fair representation merely because it opted not to take the grievance to arbitration particularly when the controlling collective bargaining agreement (1972-1975) did not allow petitioners to "bump back" into the Production De-

partment. *Hines v. Anchor Motor Freight,* supra. Teamsters was not obligated to satisfy each of petitioners' demands at all costs. *Freeman v. O'Neal Steel, Inc.,* 609 F. 2d 1123 (5th Cir. 1980).

Although Teamsters strongly contend that the grievance was not meritorious, mere proof that it was meritorious does not establish a breach of duty of fair representation. *Woods v. North American Rockwell Corporation,* 480 F. 2d 644 (10th Cir. 1973). Nor is a union obligated to secure enforcement of seniority rights of some in the bargaining unit in direct derogation of the controlling collective bargaining agreement, i.e. the 1972-1975 agreement.

The Court of Appeals considered all of petitioners allegations of error and held that they were, individually and collectively, without merit.

CONCLUSION

Certiorari as to Teamsters should be denied. Petitioners have failed to show that there are special and important reasons for granting review of the Court of Appeals' decision. They have not shown a conflict of applicable decisions with this Court or with another Court of Appeals on the same matter. In their Conclusion, petitioners appear to abandon all questions and issues as to Teamsters except for the issue of Teamsters' failure to discover the "side agreement" which was not controlling at the time of the layoff. Such a failure does not constitute, in this factual situation, a breach of Teamsters' duty of fair representation. The petition must show more than a mere possibility of error. It is highly unlikely that questions involved here will recur in other cases. There-

fore, there is no special and important reason to grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 77-2234

RODELL GRANT, et al.,
Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS CORPORATION, et al.,
Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW the plaintiffs and move the Court to enter partial summary judgment in favor of plaintiffs in regards to the undisputed issues of law under the Collective Bargaining Agreement entered into by and between all defendants and consequently the plaintiffs as members of the above defendant unions in the following respect, to-wit:

1. That under the 1972-75 Collective Bargaining Agreement, plaintiffs had the right to exercise their accumulated seniority to transfer back from the Maintenance Department to the Production Department under the provisions of said Collective Bargaining Agreement as specified more fully herein.

WHEREFORE, plaintiffs pray that the Court enter partial summary judgment in favor of the plaintiffs and against all defendants.

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